In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,

v. No. 412.

HERMAN H. OPPENHEIMER ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Under the misleading caption "Errors and omissions in Government's statement of facts," the defendant in error (Brief, pp. 1, 2) suggests several additions on pages 3, 4, 5, and 8 to the statement of the case made in the Government's brief. The statement of the case prepared by the Government in its brief was made in strict accordance with paragraph (1), section 2, of rule 21, to the effect that the brief shall contain:

> A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

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There is nothing to prevent the defendant in error from preparing and submitting a statement of his own if he is not satisfied with that prepared by the Government. The statement of the case is not supposed to set out the whole record, as defendant in error seemingly supposes.

He further states (Brief, p. 2) that the statement by the Government "that 'Judge Pope overruled the demurrer in toto' is absolutely incorrect;" and that (Brief, p. 2) the statement on page 17 of the Government's brief is erroneous, viz, that the lower court rendered its decision solely on the latter plea (the motion to quash).

The point is not material; but the Government calls attention to the opening and closing sentences of Judge Pope's opinion (Record, pp. 47–49) and to the wording of the order entered (Record, p. 49).

In reply to Point II (motion to dismiss) on defendant in error's brief.

On pages 13 and 14 of his brief, the defendant in error cites a number of Supreme Court cases to sustain his contention that the construction of a statute must be involved even though the case had been brought up under that paragraph of the criminal appeals act providing that a review may be had of a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," adding (p. 14):

> In these cases, the construction of the third section of the act was not always involved.

It may be noted that the third section or paragraph of the act as to special pleas in bar was involved in but one of the cases cited (*United States* v. *Mason*, 213 U. S. 115), the others coming up on writs of error to review the action of trial courts sustaining demurrers to indictments.

The defendant, however, does not explain *United States* v. *Barber* (219 U. S. 72), in which no construction of any statute was involved at all. The Government's whole contention was that the plea of limitation set up and erroneously sustained in that case as a plea in abatement was in fact and in law a special plea in bar; and that therefore this court had jurisdiction under the criminal appeals act. The court sustained this contention that the plea in abatement was in reality a plea in bar and had been erroneously pleaded, and held (p. 78): "The motion to dismiss the writ of error for want of jurisdiction is overruled." No question of the construction of Rev. Stat., section 5440, on which the indictment was founded, was discussed or involved in the Government's brief on this point of jurisdiction or by the court on this branch of its opinion. The court stated the point at issue as follows:

> Only the action of the court on the fourth count is open for consideration [i. e., the judgment sustaining the alleged plea in abatement.]. (Insertion ours.) It is for the purpose of correcting such action that the United States has prosecuted this writ, do-

ing so upon the assumption that the judgment complained of is embraced within the third class of judgments which it is provided by the act of March 2, 1907, c. 2564, 34 Stat. 1246, may be removed to this court by writ of error, viz, a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy."

In reply to Point I (on the writ of error) on defendant in error's brief.

In *United States* v. *Barber* (219 U. S. 72) it is true that Mr. Chief Justice White did say, as quoted by defendant on page 28 of his brief (p. 78):

> As said by counsel for the Government, "the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, * * *."

But, he also said (p. 78):

> Many propositions have been urged at bar in support of the contention that the judgment complained of was erroneous. We find it necessary, however, to consider but one, wherein it is claimed that "a special plea in bar is not permissible in a criminal case, but the defense of the statute of limitations must be made under the general issue." This contention, as applied to the character of case now under consideration, must be sustained, upon the authority of the recent decision in *United States* v. *Kissel*, 218 U. S. 601. In

> that case it was held that where an indictment charges a continuing conspiracy, which is expressly alleged to have continued to the date of the filing of the indictment, such allegation must be denied under the general issue ,and not by a special plea, * * *

Necessarily, if a plea can be set up only under the general issue, it can not be considered until a jury had been sworn, and testimony introduced or evidence adduced to support the plea. In such case, the defendant would have been placed in jeopardy, and no review could be had under the third section of the criminal appeals act; and in such case the above expression, quoted by the defendant in error to the effect that a judgment on plea in bar is " necessarily an acquittal," would of course be correct. But Judge Thomas's decision sustaining the plea of statute of limitations to an indictment charging a completed (not a continuing) conspiracy was NOT rendered *after* but *before* jury trial. Hence, it clearly was not an " acquittal," in the sense in which that word was used by the court, *supra*.

As to the quotations from congressional debates appearing on defendant in error's brief, pages 10 to 12, it need only be said that the manner of their presentation is the best illustration of the wisdom of the rule laid down by this court against referring to congressional debates for construction of a statute.

The debates on this bill in its various stages and with various amendments made to it occurred on

February 4, 1907 (Cong. Rec., vol. 4, part 3, pp. 2190 to 2197); on February 12, 1907 (*ibid*, pp. 2745 to 2763); on February 13, 1907 (*ibid*, pp. 2818 to 2825)—covering, therefore, 35 pages of the Record.

The quotations made from speeches by the various Senators during the debate, cited on the defendant in error's brief, are isolated passages occurring on different days and in different connections, and can not be understood unless read in connection with the whole debate at the particular stage of the bill at which they were uttered.

It is plain that there is no doubtful language used in the third paragraph of the statute *as enacted* and that the right to take a writ of error "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy" is given in explicit and unconditional language.

On page 33 of his brief defendant in error quotes Wells on Res Adjudicata, section 274, to show that the sustaining of a plea of limitation constitutes *res adjudicata*. He might also have quoted sections 407 and 408, portions of which read (p. 318):

> SEC. 407. We have passed over the ground relating to parties and issues in personal actions of a civil nature and come now to the application of the same principles to public prosecutions. These are sui generis, especially in one particular, as to the bearings of this subject, namely, a want of mutuality which is regarded as an essential ingredient in the doctrine of *res adjudicata* as to civil personal actions.

> SEC. 408. The principal—which is parallel to the principle prevalent as to the fundamental rule in civil cases—is *that no one shall be twice put in jeopardy for the same offense.* And, accordingly, the primary inquiry under it is, when does jeopardly attach so as to be a bar to any subsequent prosecution? The boundary line generally observed seems to be the point where the case is given to the jury for decision.

This sustains the Government's contention that the only equivalent in the criminal law to the doctrine of *res adjudicata* in the civil law is the doctrine of jeopardy.

Cases cited by defendant in error in his brief (pp. 28–39) to sustain his contention that the doctrine of *res adjudicata* applies in a case like that at bar are all to be brought within one of the three following classes, none of which are pertinent:

> (a) Cases of judgments in civil causes;
>
> (b) Cases where a judgment rendered *after trial* in a criminal case has been held to be conclusive in another trial involving the same question and the same parties;
>
> (c) Cases determined under criminal codes containing specific provisions differing from common-law doctrines.

The case of *Rex* v. *Duchess of Kingston* (1776), 20 State Trials 538, relied on by defendant in error, involved the question whether a judgment of annulment or jactitation of marriage rendered *after trial* in a spiritual court was conclusive in a sub-

sequent trial in a common-law court of one of the parties for bigamy.

Of the other criminal cases *cited* by defendant in error (other than those decided under criminal codes), it is believed that all were cases of the effect of a *judgment rendered after trial* (with the possible exception of *Regina* v. *Houston* (1841), 2 Crawford & Dix 310—a decision in Cases ruled on Circuits in Ireland). With reference to the latter case, it may be said that it is not in point, except as an example of English criminal practice with reference to the difference between the effect of pleas or demurrers in misdemeanor and in felony cases, see Chitty, pp. 434, 435, 441, 442, 443 (incompletely quoted by defendant in error on his brief, p. 30).

An expression used by Mr. Justice Pitney in *Frank* v. *Mangum* (1915) (237 U. S. 309), *not cited by defendant in error on his brief,* may seem, on its face, more favorable to his contention than any case cited by him.

Mr. Justice Pitney said (pp. 333, 334):

> It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction can not afterwards be disputed between the same parties. *Southern Pacific Railroad* v. *United States* (168 U. S. 1, 48).

> The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.

With reference to these remarks, the Government desires to point out: First, that they were made as *dicta*—for the Justice continued (p. 334): "However, it is not necessary, for the purposes of the present case, to invoke the doctrine of *res adjudicata*"; second, the citation of the case in 168 U. S. shows the sense in which the remarks were to be taken. The case cited was a civil cause of action (as were the numerous cases cited in it) and held that "a right, question, or fact distinctly *put in issue* and directly determined by a court of competent jurisdiction *as a ground of recovery*, can not be disputed in a subsequent suit between the same parties or their privies." [Italics ours.] This familiar doctrine unquestionably applies in both criminal and civil cases, but goes no further than other cases cited by defendant in error which hold that a matter *put in issue* and resulting in a judgment *after trial* is conclusive in a subsequent trial.

This is far from establishing a doctrine that a ruling *before trial* in a criminal case on a point of law on a demurrer, plea, or motion to quash, is a bar to any subsequent indictment for the same offense.

Defendant in error seems to lay stress on the fact that the Government took no writ of error under the criminal-appeals act from Judge Thomas's decision on the first Oppenheimer indictment. Lay-

Oppenheimer is alleged to have illegally received, and to have sworn falsely about, and served to continue the effect of the conspiracy. A referee in bankruptcy has full power to order the return of money or property illegally paid to his attorney by a bankrupt upon proper application from the trustee of the estate.

See *Knapp & Spencer Company* v. *Drew* (1908), C. C. A., 8th Cir., 160 Fed. 413, 415, 416:

> Appellant first contends that it was an adverse claimant of the money in question and could not be proceeded against summarily by motion, but was entitled to defend itself and justify its adverse claim in a plenary suit instituted by the trustee for the recovery of the money. This position, we think, is totally untenable. Appellant made no such claim in its original answer to the order to show cause. *On the contrary it denied positively and under oath that it had ever received the money from the bankrupt as charged.* Notwithstanding there was no issue of an adverse claim to the money tendered or joined the referee took occasion to say in his finding that appellant's possession of the money was " without color or right."

See also Collier on Bankruptcy (1912), page 595:

> Under this clause, it has been held that the referee may grant stays, appoint receivers, issue summary orders to compel restitution of property, * * *.

See also *Mueller* v. *Nugent* (1901), 184 U. S. 1.

Defendant in error attempts to becloud the point raised by asserting that the testimony before the referee hereinabove referred to shows that he admitted receiving $1,200 from Joseph Samuels & Co., as attorney (Brief, pp. 43, 44). Oppenheimer did admit receiving $1,200 on account of prior services from the firm of Joseph Samuels & Co. in the latter part of *July* (Record, 30); but he afterward modified his statement and said (Record, 39) that he received $1,235 " for the services I had rendered to the sister at the request of Jacques Samuels. After the close, no. I think I was paid before the 20th, before I knew of the insolvent condition."

But he is alleged to have received the note for $897.36, belonging to the estate of Joseph Samuel & Co., on or about *September 1, 1912,* after the petition in bankruptcy had been filed and a receiver of the Samuels company appointed. Taking this note under such circumstances constituted an offense against the bankruptcy law (*Knapp* v. *Spencer, supra*), and if he swore falsely that he received nothing for his legal services after the institution of bankruptcy proceedings, as the indictment alleges, he is unquestionably guilty of an *active* overt act to continue the effect of the conspiracy, and NOT, as is said in his brief (p. 44), of "only a *passive* recital of 1914 of an alleged act in 1912."

The indictment on its face clearly sets out a continuing conspiracy, and whether Oppenheimer received the note, as charged therein, is a matter

which can only be determined by the jury when the case is *tried* in the court below. The only point involved under defendant in error's plea of *res adjudicata* is that the indictments are the same; and the Government is entitled to a review of that question. Assuming that the first indictments charged a completed conspiracy, the Government now presents an indictment charging a continuing conspiracy; and it is necessary for the court to determine whether it does or not, for if it does, a decision on the one could not be considered as being a bar to a trial on the other, even if it could be so treated, were the indictments the same, where there had been no jury sworn, no jeopardy had attached, and no *trial* had been had.

Respectfully submitted.

CHARLES WARREN,
Assistant Attorney General.
A. J. CLOPTON, *Attorney.*

OCTOBER, 1916.

○

No. 412.

Supreme Court of the United States

OCTOBER TERM, 1916.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

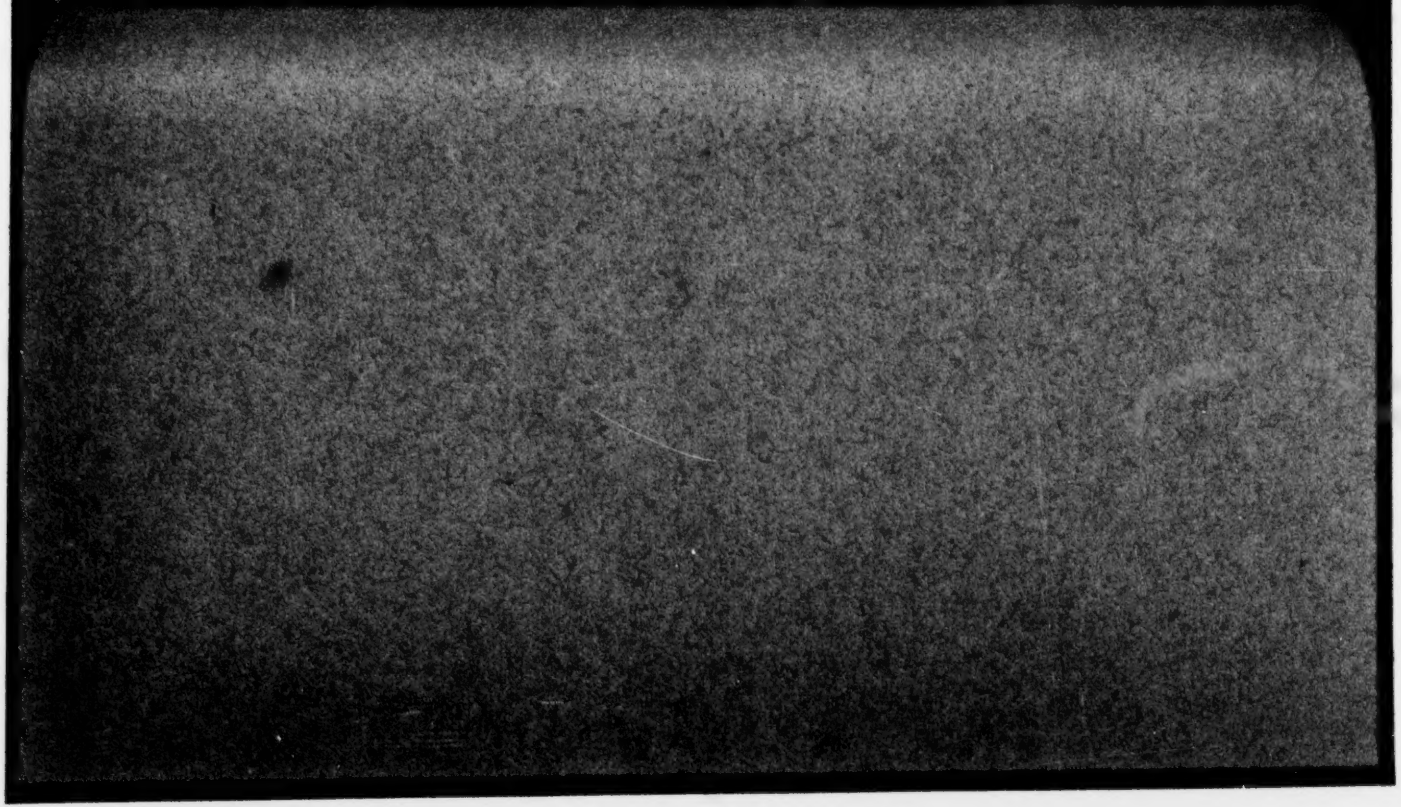
v.

HERMAN H. OPPENHEIMER, et al.
HERMAN H. OPPENHEIMER, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

On Motion to Dismiss.
On Writ of Error.



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THE ARGUMENT ON MOTION TO DISMISS.

POINTS:

CASES CITED.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, Plaintiff-in-Error, against HERMAN H. OPPENHEIMER, et al.	Case Number 412. October Term 1916.
THE UNITED STATES OF AMERICA, against JACQUES SAMUELS, JOSEPH SAMUELS, ABRAHAM SAMUELS, HERMAN J. DIETZ, CHARLES HEPNER and HERMAN H. OPPENHEIMER, Defendants.	

ERRORS AND OMISSIONS IN GOVERNMENT'S STATEMENT OF FACTS.

Page 3, Government's brief, we add point that the present indictment December 21st, 1914, was returned after the time to obtain a writ of review of the order of Judge Thomas on the previous indictment had expired.

Page 4 of Government's brief; we add the demurrer and motion to quash set out other matter not proper in a plea in bar (R., page 36) Nos. 3 to 9.

Page 5: The pleas in bar and abatement were withdrawn only after motion by the prosecutor to strike them from the record (R., pages 42 to 45) and without prejudice, page 45. In this motion to strike from the record, the District Attorney did not claim that the demurrer and motion to quash were anything but what they were named.

Page 5: The statement by the Government that "Judge Pope overruled the demurrer in toto" is absolutely incorrect, see opinion of Judge Pope (R., page 47) and order (R., page 49) and the Government's argument of "the singularity" fails. We respectfully refer to the opinion (R., page 47), showing the decision was based on the construction of the overt acts and the effect of a final judgment and not on any statute.

Page 8: We call attention to the statement that the writ of error was seasonably filed on the last indictment, it should be noted none was filed on the first indictment (R., pages, 3, 8).

Page 9: The specifications printed are not those in the record (R., page 50). But neither set raise a reviewable question "that the Court below erred in the construction of any statute" the only question on which this Court takes jurisdiction under the Criminal Appeals Act.

Page 17 (Government's brief). The statement that "the lower Court rendered its decision solely on the latter plea" (the motion to quash) is not borne out by the decision itself which clearly makes no reference to which plea was sustained, it may have been the demurrer.

Other misstatements of facts in Government brief are pointed out in our brief, page 44:

THE QUESTIONS INVOLVED.

(On Motion to Dismiss.)

I. Was the motion to quash and demurrer which were decided below a "plea in bar?"

The government practically admits by its brief that if the matter below was decided on a motion to quash or demurrer, and the decision did not construe a statute, the writ of error must be dismissed.

II. But contends the motion and demurrer was a "plea in bar" and that as such, it was appealable whether or not the decision involved a construction of a statute.

III. The defendant contends the matter below was decided as a motion to quash and demurrer and the decision did not construe any statute, and

IV. That whether as a demurrer, motion to quash, or plea in bar, it was not appealable unless the government first raised a reviewable question by its writ or error, and second, unless the decision construed a statute.

V. Defendant in error contends that the citation and writ of error are defective and improper, leaving only one person indicted on a conspiracy indictment, and do not bring any of the other defendants here. The order dismissed the indictment as to all.

The government contends it can bring up on appeal one at a time—or all.

(*On Writ of Error.*)

I. Defendant contends, that the Court has repeatedly said it will not entertain an appeal unless the decision of the lower Court construes a statute, hence that it will not go into this case to see if the Judge below was right in upholding the effect of the former judgment, but that if this Court does go into that question, it will find that the action of the Court below was proper.

II. That this Court will not go into the construction or sufficiency of the overt acts or the indictment to ascertain whether they were the same as in previous indictments or well alleged overt acts, but that if it does, it will find this indictment legally identical with the former, and the new overt act not an act at all and that section 37 of the Code nor any section or statute was construed, and will therefore sustain the Court below.

The questions raised by government on page 10 of its brief numbered I, III and IV, are not in this case.

POINT I.

(*Motion to Dismiss.*)

The pleadings below were entitled and adjudicated as "Demurrer" and "Motion to Quash." They were not "a plea in bar." This Court will not construe pleadings and hold a demurrer or motion to quash to be anything else, unless it clearly appears that:

(A) "The decision entered was based upon the construction of the statute upon which the indictment is founded." United States vs. Adams Express Co. (1912), 229 U. S., 381; Gov. Brief, page 16, or

(B) "The Court in the judgment expressly placed its decision that the United States could not prosecute the defendants, upon the plea of the bar of limitations." United States vs. Barber, 219 U. S., 72; Gov. Brief, page 16.

The government relies on these two cases as conclusive that this court will *in all cases construe* on writ of error the pleadings below, even when there is no construction of a statute by the lower court. Defendant in error believes the words set forth above, and quoted in government's brief, pages 15-16, shows clearly that there must be something more than a mere improper designation of the pleas in order to move this Court; the decision below

must clearly be based upon the construction of a statute. Otherwise the Court will not construe the pleadings.

The facts pleaded in the demurrer and motion to quash to the effect that the new overt act alleged in the last indictment never occurred (as shown by the court records), and that they were insufficient, *could have no proper place in a plea in bar,* they were matter to the effect that the indictment did not state a crime and that there were no new overt acts alleged.

Even if it were found that the court had passed on a demurrer and motion to quash which contained matter which might have been set up in a plea in bar, there could be no review unless the decision below contained the prerequisites at the head of this brief, for as pointed out in government's brief, page 13, Durland vs. United States, 161 U. S. 305, 314, "objections raised by a motion to quash are addressed to the discretion of the court, and the refusal to quash is not generally assignable as error," so that while not reviewable generally they only can become so by the decision of the lower court construing a statute even when they contained matter which might be set up in a plea in bar.

Since therefore the decision below in this case does not bring it within the rule announced in the two cases in government's brief, we submit the appeal should be dismissed.

POINT II.

(*Motion to dismiss.*)

The jurisdiction of this Court is limited by the criminal appeals act of March 2nd, 1907, to the consideration only of decisions of the Courts below construing statutes, and cannot be used for the purpose of correcting other errors.

The contention of the Government appears to be that a decision sustaining a plea in bar is reviewable irrespective of whether the construction of a statute is involved, basing its contention upon the third section of the statute, which is as follows:

> "From a decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy."

And the fact that this section does not contain the limitations upon the right to appeal, prescribed in the first two sections.

We think that the decision of this Court in the matter of the United States vs. Kissel, 218 U. S., 601, is a complete answer to the contention, and determinative against the Government, on the application to dismiss the writ of error on the question as to the right to review the judgment below, even if the pleadings were held to be a plea in bar, for in that case the Court held, at page 606:

> "We deem it unnecessary to state the pleadings with more particularity because the only question before us under the Act of March

2nd, 1907, C. 2564; 34 Stat., 1246, is whether the plea in bar can be sustained. That this Court is confined to a consideration of the ground of decision mentioned in the statute when an indictment is quashed, was considered in United States vs. Keitel, 211 U. S., 370, 399.

> *We think that there is a similar limit when the case comes up under the other clause of the act, from a 'judgment sustaining a special plea in bar when the defendant has not been put in jeopardy.' This being so, we are not concerned with the technical sufficiency or redundancy of the indictment or even in the view that we presently shall express, with consideration of the nature of the overt acts alleged."* (Italics ours.)

It would seem that this language is too clear to admit of construction.

In view of the insistence of the Government in its brief (page 24),

> "that the contention is without merit and the expression quoted wholly misconstrued"

by defendant in error, a statement neither convincingly explained nor supported by argument or citation, we deem it advisable to submit extracts from the history of the statute, and discuss its construction as it has been passed upon by this Court, in order to show conclusively that this Court has properly construed the section in question in the Kissel case.

In one of the earliest cases in this court under the statute, this Court recognized the purpose of

the entire act, holding in United States vs. Bitty, 208 U. S., 393, at page 400, Mr. Justice Harlan writing the opinion:

> "If a court of original jurisdiction errs in quashing, setting aside or dismissing an indictment for an alleged offense against the United States upon the ground that the statute upon which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review; *hence, that there may be no unnecessary delay in the administration of the criminal law and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced, the above Act of March, 1907, was passed.*" (Italics ours.)

And this was the sole purpose of the act as appears in the debates in Congress.

The statute originated in the House of Representatives (H. R., 1907, 15,434) and as originally introduced it was intended to give as broad a power of appeal to the Government as that given to the defendant.

Upon being reported by the Judiciary Committee of the Senate, it had been amended so that its sponsors declared the purposes of the bill to be to give the Government a right to review only questions embracing the validity and construction of statutes, for we find in the debates the following

statements of its purpose (Cong. Rec., Vol. 41, Part 3, page 2192, Col. 1):

> Mr. Bacon: In the case where a man is indicted and he is brought before the Court and a demurrer is interposed before he is arraigned, upon the ground that the law under which he is charged with the commission of the crime was unconstitutional, utterly null, and void, the Judge sustains that demurrer and discharges the prisoner. Now, if that affected only one prisoner, it would be a matter of comparatively slight importance; but it not only affects that prisoner—not only affects the accused in that particular case—but it affects all other persons who may assume to violate the same law; and a law of Congress is set aside, made absolutely null and void and inoperative by the decision of our Judges, without the opportunity for the nine Judges who sit in the Supreme Court to pass upon the great question whether or not the law solemnly enacted by Congress is or is not constitutional, affecting not simply that accused, affecting not simply all others who may be accused, but affecting the operation of the law of the land, and affecting all interests which are to be affected by that law, and utterly destroying all the protection which that law seeks to throw over the persons, the property, and the transactions of all citizens of the United States.

And again at page 2191, col. 2:

> *"Mr. Mallory: In reference to the point, the Senator is on I should like to call his atten-*

tion to the provision overruling or sustaining a special plea in bar in the following language: 'From a decision or judgment sustaining a special plea in bar when the denfendant has not been put in jeopardy,' I am asking merely for information, not with any intention—

Mr. Bacon: *That language was inserted in the bill just out of abundance of caution."*

Mr. Clarke of Arkansas (page 2821, col. 2): *I merely want to say to the Senator from Nevada that after he left the chamber the bill was amended so as to limit its scope to questions that involve the constitutionality and construction of statutes. Therefore there is no great danger now that anybody will be very seriously oppressed by the bill in its present condition. Under the bill, the inquiry is limited to questions of law—not questions of law generally, but only such as involve the constitutionality of and construction of statutes."* (Ital. ours.)

Senator Clay (page 2823, col. 1): I wish to ask the Senator in charge of this bill a question * * *As I understand the bill now, the Government can only appeal in a case where a demurrer has been sustained or where an indictment has been quashed or where there has been a conviction or arrest of judgment *when the constitutionality or the validity of the act is involved.*

Mr. Nelson: That is substantially it, etc.

Mr. Clay: *Before the amendment was adopted the bill provided that in all criminal cases where a demurrer has been sustained or an indictment quashed, regardless of the validity of the act, there should be an appeal, but*

now these amendments allow the Government to appeal simply in cases where the contitutionality of the act is questioned.

Mr. Nelson: *When the validity of the Statute under which the indictment is framed is involved.*

Mr. Spooner: *Or its construction."*

Thus the history of the act indicates clearly that the only purpose of the act in its entirety was to enable the Government to secure a review upon the construction or validity of a statute upon which an indictment was founded, to the end that legislation by Congress should not be rendered abortive by the action of a nisi Judge, and that it was not intended by any section of the act to open up other fields of review. The act was considered as an entirety, leading to the purpose sought to be achieved, and no one part was singled out as giving greater jurisdiction than another. This so clearly appears by the debates that further argument would be a work of supererogation.

There can, of course, be no question that this Court may refer to the records of Congress to ascertain the intent and meaning of legislation. * * *

Holy Trinity Church vs. United States, 143 U. S., 457, 464.
Blake vs. National Banks, 23 Wallace, 307, 317, 319.
Jennison vs. Kirk, 98 U. S., 458, 460.

Its intention being thus ascertained, it shows beyond peradventure that it was not intended even by the third section to open up fields of review other than those in which the validity and con-

struction of a statute were involved. In all its decisions upon this statute the Court has recognized the evident purpose of the act.

United States vs. Bitty (supra).
United States vs. Stevens, 215, U. S., 190.

Mr. Justice Day, writing the opinion, page 196:

> "The object of the Criminal Appeals Statute was to permit the United States to have a review of statutory construction in cases where indictments had been quashed, or set aside, or demurrers sustained thereto, with a view to prosecuting offenses under such acts when this Court should be of opinion that the Statute properly construed, did in fact embrace on indictable offense. * * *
>
> As the general question of law involved in the decision of the Court below is not within either of the classes named in the statute giving a right of review in this Court, we must decline to consider it upon this writ of error."

And again in United States vs. George, 228 U. S., 14, Mr. Justice McKenna writing, page 19:

> "This statute seems to require an explicit declaration of the law upon which an indictment is based and a ruling on its validity and construction."

These are followed in all of the cases:

United States vs. Carter, 231 U. S., 492.
United States vs. Biggs, 211 U. S., 507-518, 522.

United States vs. Sullenberger, 211 U. S., 522.
United States vs. Moist, 231 U. S., 702.
United States vs. Forrester, 211 U. S., 400.
United States vs. Herr, 211 U. S., 404.
United States vs. Foster, 233 U. S., 515-523.
United States vs. Keitel, 211 U. S., 370.
United States vs. Freeman, 211 U. S., 525.
United States vs. Mason, 213 U. S., 115.
United States vs. Mescoll, 215 U. S., 26.
United States vs. Patten, 226 U. S., 525-535.

In these cases, the construction of the third section of the act was not always involved. In the Kissel case (supra), however, the question was passed upon by the Court and the third section was held to be within the same limitations as those contained in the first two sections, thus bringing it within the intent of the legislation.

This Court will look into the act for the purpose of ascertaining the evils sought to be corrected by it and will not so construe the act as to embrace matters that were not clearly within the evils sought to be remedied.

Holy Trinity Church vs. United States (supra), page 472.
Smith vs. People, 47 N. Y., 331, 336.
Bell vs. Mayor, 105 N. Y., 139, 144.

And it will not assume appellate jurisdiction that was not intended, even though the wording of the act may be broad enough to give it.

American Security Co. vs. District of Columbia, 224 U. S., 491.

We therefore contend that a proper construction of the act requires that this Court adhere to its decision in the Kissel case, that the limitations prescribed in the first two sections apply equally to the third section of the act, for, were it otherwise, it would open this Court to a flood of writs demanding reviews on questions of fact or of law or both, a result that it is obvious was never within the intention of Congress.

U. S. vs. Carter, ante, p. 493,

by Mr. Chief Justice White, page 493:

> "It is settled we cannot revise the mere interpretation of the indictment and are confined to ascertaining whether the Court erroneously construed the statute and our power to revise can alone rest upon the theory that what was done amounts to a construction of the statute (*Keitel* case, 211 U. S., 371; *Stevenson*, 215 U. S., 190), but it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

and page 494:

> "Indeed to follow the suggestion, would be to frustrate the purposes which manifestly the

jurisdictional act was enacted to accomplish; because the intent to expedite in criminal cases the decision of questions involving statutory construction, which was plainly one of the ends for which the law was intended, would be of little avail if the review be extended by implication, so as to embrace cases not within the purview of the statute, thereby multiplying appeals and delaying speedy decisions of such cases."

The history of this Court shows that the policy of Congress has been to relieve it from deciding questions of fact and giving it its proper function, the declaration of the supreme law of the land.

Therefore, whether the matter below was decided upon a motion to quash or as a plea in bar, the same rule obtains, and unless the decision of the Court below *was based upon the construction of a statute,* there is no right to a review.

POINT III.

(*Motion to dismiss.*)

The action of the Court below was not based upon the construction or validity of any statute.

The opinion of Judge Pope, Record, page 47, clearly shows this point well taken.

The decision of the Court below was based upon the construction of the indictment, the Court, in effect, holding, that it was legally identical with former indictments which had been dismissed upon demurrer and that the judgment of the court on the first indictments not having been appealed

from or reversed, was conclusive on the government. In so holding, the Court was not obliged to construe any statute, as there can be no question that there is no statute defining when and under what conditions indictments are identical, no statute defining the effect to be given a judgment sustaining a demurrer to an indictment, and certainly no statute governing the court in basing its action on former adjudications. All of these are matters which must be decided on the law as evolved from the decisions of the courts upon the questions involved, and no statute gives the government the right to appeal such decisions.

The action of Judge Pope in dismissing the second indictment is expressly stated to be by him on the following grounds:

> *"Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the statute of limitations has run against their alleged offense?* The Government urges that this may be done, and further sets forth to the Court that since the decision of Judge Thomas, a decision of the Circuit Court of Appeals for this circuit, as well as a decision by the Supreme Court of the United States, has shown that the statute of limitations did not run until three years after the offense instead of one year as held by him, and that his decision was erroneous. This latter, however, does not impress me as being of relevancy, provided the defendants have heretofore been heard upon this issue, having been discharged thereunder, *and that judgment being unappealed from remains in full force and*

> *effect.* The decision of Judge Thomas in my judgment becames the law of the case, and, until reversed, protected the defendants from further prosecution arising from the same state of facts. *While, of course, were the case open to decision upon the question of limitation, the decision of the Appellate Courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging them remains in force and effect* (*Record, fols.* 87-88). (Italics ours.)

This language is clear and unequivocal.

The distinct grounds upon which the decision is based are clearly stated. The Judge plainly disclaims any intention to construe or pass upon the validity of the statute, stating that question was not before him, and that the only question before him was the effect of the former judgment on the present indictment. Ingenuously, the government argues that the effect of the opinion and order of Judge Pope, is that it sustains the one year statute of limitations, but this contention is readily disposed of when we read the opinion of Judge Pope, for he distinctly states that if that question was before him, he would have to rule in accordance with the decision of this Court, holding that three year statute of limitations applied.

Who upheld the one year statute of limitations? Not Judge Pope, for he distinctly disclaims any such intention. The answer must be, Judge Thomas did. But there is no appeal pending from Judge Thomas' judgment. It was allowed to remain in full force and effect. If the Government had not

acquiesced in the judgment and allowed it to remain in force, but had taken an appeal, which it had the right to do, the judgment, if erroneous, could have been corrected. But what it had a right to do then, has been lost by its own action and it seeks to attain this end now, not by direct, but by the devious means of collateral attack. In other words, the Government now seeks a review of the judgment of Judge Thomas, although no appeal has ever been taken from it and the time to obtain a review has long since passed. This cannot be done.

> Turner vs. Farmers' Loan & Trust Co., 106 U. S., 552, 555.
> Trust Co. vs. Grant Loco. Works, 135 U. S., 207, 226.

To uphold the contention of the Government would in effect be providing a method of review in a manner not provided for by statute.

It is clear that the judgment sought to be reviewed is not based upon a construction of a Statute. The writ of error ought to be dismissed, for it is replete with the faults which have been found by this Court to be fatal to a review sought under the Criminal Appeals Act.

Thus in United States vs. Carter, 231 U. S., 492, 493, this Court held, Mr. Chief Justice White, writing:

> "Our power to review the action of the Court, then, in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were

quashed, were bad in law, did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment. It is, however, insisted on behalf of the United States, that by referring to the counts which were held good and comparing them with those which were quashed, by a process of exclusion and inclusion it will be possible to ascertain that the action of the Court was based upon a construction of the statute, and we are asked to review the case upon this theory. At best this proposition amounts to the contention that in every case where there is a doubt as to whether the Court construed the statute or interpreted the indictment, such doubt should be solved by an examination of the entire record. But the right to review in a criminal case, being controlled by the general law, it follows that a case cannot be brought within the control of the special rule provided by the Criminal Appeals Act, unless it clearly appears that the exceptional and not the general rule applies. Aside from this consideration, we cannot give our approval to the suggestion made by the Government since in effect, it virtually calls upon us to analyze and construe the indictment as a pre-requisite basis for the exertion of the limited power to review the action of the Court in interpreting the statute. Indeed, to follow the suggestion would be to frustrate the purposes which manifestly the jurisdictional act was enacted to accomplish; because the intent to expedite in criminal cases the decision of questions involving statutory construction, which was plainly one of the

> ends for which the law was intended, would be of little avail if the right to review be extended by implication, so as to embrace cases not within the purview of the statute, thereby multiplying appeals and delaying the speedy decision of such cases."

And in United States vs. Moist, 231 U. S., 701, Mr. Justice Holmes writing the opinion, the Court there held (page 702):

> "There is nothing in the record showing any request made to the trial court for an expression of an opinion in such form as to manifest clearly whether its action proceeded upon a construction of the statute or merely upon the meaning which was given to the indictment and as it does not appear that the judgment turned upon any controverted construction of the statute, the writ of error must be dismissed."

And in United States vs. Barnow, 239 U. S., 74, Mr. Justice Pitney writing (page 79):

> "Since our review under the Criminal Appeals Act is confined to passing upon questions of statutory construction, we are not here concerned with the interpretation placed by the Court upon the indictment."

And in United States vs. Biggs, 211 U. S., 507, Mr. Justice White writing (page 518):

> "The right given to the United States to obtain a direct review from this Court of the

rulings of the lower court on the subjects embraced within the Statute of 1907, does not give authority to revise the action of the court below, as to the mere construction of an indictment, and therefore in the exercise of our power to review on this record, *we must accept the construction of the indictment made by the lower court and test its construction of the statute in that aspect.* * * *

"We think the conclusion cannot be escaped that the construction given by the court below to the indictment, was the result merely of the analysis which the court made of the indictment as an entirety, of its appreciation of the nature and character of the acts therein referred to and of the overt acts alleged, the whole read in the light of the elementary canons of construction, applicable to criminal pleadings."

We submit that the decision of the court below did not construe a statute and that the effect of the decision was not to pass upon the construction or validity of a statute, but merely to apply the elementary law of the effect of a former judgment.

The review sought by the Government herein is an indirect attempt to review the judgment of Judge Thomas, from which no appeal was taken.

POINT IV.

(Motion to dismiss.)

The writ of error, assignment of errors and citation are defective, because they do not bring before this Court all the proper parties, they omit the names of some of the parties, and are insufficient to raise the only point appealable in such appeals as this, and are too general.

The citation, writ of error, etc., fail to state or raise the only point which would give this Court jurisdiction, i. e., that the Court below construed a statute.

They fail to bring before this Court all the proper parties, and fail to give the names of all the parties (Record, pages 2, 50, 51, compared with order; page 49, and indictment and opinion; pages 47, 16).

They are too general under the decision.

In order that this Court may have jurisdiction, the writ of error must contain words to the effect, "that the Court erred in the interpretation, construction or invalidity of a statute by," etc., etc., or else they do not raise the question that "the decision of the Court below construed a statute," for this is the only ground on which this Court will uphold jurisdiction of this appeal under all the cases reported.

This omission seems so evident from a reading of the assignments of error that we refrain from taking up each assignment of error separately, except to say that the words are missing and

the interpretation thereof to raise the necessary question means that this Court will do what it has repeatedly announced it will not do, to wit, look through and open the entire case to ascertain whether a possible error had been committed, which would give this Court jurisdiction when it is not distinctly raised in the writ and assignment of error and the opinion shows to the contrary.

In fact, the alleged assignments of error negative the assumption that the Court interpreted a statute by pointing out the reasons for the action of the Court below, which are clearly without the jurisdiction of the Court.

THE ERRORS NOT CLEARLY ASSIGNED WILL NOT BE NOTICED BY THIS COURT.

Supreme Court, Rule 21, Subdivisions 2 and 4.

U. S. vs. Carter, 231 U. S., 492 (also quoted on another point).

George vs. Wallace, 135 Fed., 286.

Jones vs. U. S. ex rel. Tompkins, C. C. A., 135 Fed., 518.

Smith vs. Hopkins, 120 Fed., 921.

Craig vs. Dorr, 145 Fed., 307.

Ireton vs. Penn. Co., 185 Fed., 84.

Van Stone vs. Stillwell & B. Co., 142 U. S., 128.

Stevenson vs. Barbour, 140 U. S., 48.

The writ of error is otherwise defective, for a writ of error is an institution of a new suit in the Court of Review.

Simpson vs. First Nat. Bank, 129 Fed., 257-279.

And it therefore ought to state clearly the names of all the parties.

Mr. Justice Miller, in Mussina vs. Cavazos, 6 Wall., 355, at page 361, says:

> "But many cases have been dismissed by this Court because the writ of error described either the plaintiff or defendant as A, B and others," etc. * * *
>
> Godbe vs. Tootle, 154 U. S., 576.
> Hardee vs. Wilson, 146 U. S., 179, at 181, and cases cited.

In this last case, which is a civil case, one of the reasons given applies with equal force to a criminal case (see page 181):

> "That the Appellate Tribunal shall not be required a second or a third time to decide the same questions on the same record."
>
> Smythe vs. Strader, 12 How., 327.
> Davenport vs. Fletcher, 16 How., 142.

The writ is defective because it leaves out some names and puts in only one and states, "et al." for the others.

> Deneale vs. Archer, 8 Pet., 526.
> Miller vs. Mackenzie, 10 Wall., 582.

And this was held so even where the party's firm name was stated instead of individually.

"The Protector," 11 Wall., 82.
Moore vs. Simons, 100 U. S., 145,

and where the writ of error omitted the parties named in the citation, the Court dismissed the writ, although in this case the citation is also defective.

Kaile vs. Wettmore, 6 Wall., 451.
Sea vs. Mutual Conn. Life, 154 U. S., 659.

We do not contend that this Court has not power to allow a proper amendment at any time, if a motion therefor is made but this writ cannot properly or legally be amended now, for no citation was served on the remaining defendants and time to appeal has expired as against them, and it therefore does not bring all the necessary parties before this Court.

The order dismissed the indictment not as to one but all (see Record, page 49).

If the appeal were against all and the title merely was incomplete it might be amended on application, but here we have a citation, writ of error, etc., against one, in a case against six and no application to amend, which if now applied for must be denied, as it would bring in parties now against whom no appeal was taken, and no citation served and who could not now be heard. The government's argument (brief, page 33) may apply to any crime but conspiracy, the charge here, for there never could be a legal trial on this indictment as against one only. The argument that the government in criminal cases has a right to select against whom it will take the appeal,

would in effect be, that after one writ had failed against one defendant, another might be brought up, thus, bringing successive appeals in the same case.

The anomalous situation now presented is, an opinion has been filed and order entered quashing the indictment as to the "defendants," and the Clerk has so entered on the docket and indictment (see Record, page 23) in accordance with the opinion and order pages 16 and 49, yet here only one defendant is prosecuted on this appeal (the charge being conspiracy), which appeal if successful, would not affect the other defendants, since the time to appeal as to them has expired, and so leave the order on the last indictment in effect as to five defendants and destroyed as to this defendant.

Therefore, the proper parties are not before the Court and cannot now be brought before the Court, and no question is raised by the assignments of error which would give jurisdiction to this Court, and the writ of error, assignments and citation being defective in not containing the names of the various defendants, and too general to raise an appealable question under the criminal appeals act, the writ of error and the appeal should be dismissed.

POINT I.

(On the writ of error.)

(If this Court should go beyond the motion to dismiss, the defendant-in-error submits for its consideration the following.)

The action of the lower Court in holding that the prior judgment was a bar to the prosecution of the last indictment was correct.

The judgment of Judge Thomas sustained the demurrer to the first indictments (fol. 14), and his action was based upon the ground that the Statute of Limitations barred the prosecution (opinion, record, page 45). This was a final judgment on the merits. There can be no question that the plea of the Statute of Limitations goes to the merits of the indictment, and that a judgment thereon operates as an acquittal, for this Court has so held in United States vs. Barber, 219 U. S., page 72, Chief Justice White writing (page 78):

> *"The plea of the statute of limitations does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant, the judgment is necessarily an acquittal of the defendant of the charge."* (Italics ours.)

This upheld in the exact words of the government, its contention in that case, the benefit of which the government now seeks to deprive this defendant.

The government's contention (brief, page 18) does not apply here, for there is no claim here of "former jeopardy," or any claim that "a ruling on a plea before jeopardy will preclude the bringing of a *new indictment* for the same offense and a trial thereunder." We may admit this can be done *but it must be* a *"new indictment," not the same indictment already passed upon by a Court of competent jurisdiction.* In every case cited by the government, it will be found there was a "new indictment," that is, one curing the defects, omissions and faults of the previous one, but in this case it has already been held (and that is not appealable) that the second indictment is not a *"new one,"* but is legally identical with the first. The evident contention of the government that "new" before "indictment," means "another" with the same errors, defects and omissions of the first, would lead to a ridiculous conclusion.

A judgment entered upon a plea or demurrer which goes to the merits, is a final judgment.

> "Where a demurrer is general, going to the merits of the offense, then a judgment for the defendant relieves him from further prosecution."
>
> Wharton's Crim. Pl. & Pr., 9 Ed., Section 406.

> "If the defendant succeeds in his demurrer on any mere formal exception, he only obtains a little delay, for the judgment is, that the indictment be quashed, and the defendant will be detained in custody until another accusation has been preferred against him. But

where the legal exception goes to show the facts stated on the record do not amount to a felony, the defendant will be altogether discharged."

Chitty, Crim. Law, Vol. 1 (1816), pages 442, 443.

To the same effect see also,

Bishop's New Crim. Proc., Vol. 2, Section 781 and note.
Stephen's Digest of Crim. Proc., Art. 258, page 171.
Queen vs. Houston, 2 Crawford & Dix, 310.

In this case the defendant demurred to the indictment, the demurrer was sustained and he was discharged. Upon writ of error by the prosecution the judgment was reversed and upon motion to sentence the defendant, the Court held after stating the facts, page 316:

"The question was argued before Baron Foster, and judgment was pronounced by him in favor of the demurrer, and this amounted to an acquittal on the indictment, the judgment being 'quod eat sine die.' The case was then brought before this Court by writ of error and we were all of opinion that the judgment which had been pronounced in favor of the demurrer was erroneous, and should be reversed. In consequence of this, the Crown sought, in addition to the reversal of the judgment, that sentence of condemnation should be pro-

nounced against the prisoner by this Court for the offence charged in the indictment. * * * But the real question now before the Court, is whether this Court has authority not only to reverse the judgment of the Court below allowing the demurrer, but also to pass sentence on the prisoner? * * * The judgment of the Court below in this case was a final judgment of acquittal; with that judgment alone this Court had to deal on the writ of error * * *. In the present case, therefore, the Court is of opinion that it has fully and properly exercised its jurisdiction in reversing the judgment of the Court below allowing the demurrer, *which amounted to an acquittal, but which acquittal is put out of the question by the reversal of the judgment.* There is nothing, therefore, to prevent the Crown from sending up new bills of indictment against the prisoner." (Italics ours.)

The rule as laid down by Chitty, Wharton, Stephens and Bishop, has been adopted in the Criminal Codes of many of the States, and it was necessary to add the power of resubmission which now can be done only after direction of the Court. Thus in the Code of Criminal Procedure of the State of New York, we find:

Sec. 327. "If the demurrer be allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the Court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, direct the case to be re-submitted to the same or another Grand Jury."

It certainly is not too much to say that the elusive rules of the common law have found their proper expression in these Codes, and that they command respect if only for the reason that all codification is as a rule, based upon what was the common law.

On a statute of this sort, it has been held:

> "It is suggested that the judgment was required to be final only as to the indictment to which the demurrer was sustained, but we are of the opinion that it is also final as to the issues presented by the demurrer. If the indictment shows that there cannot be a valid conviction for the offense charged, reason and sound public policy demand that the proceedings be terminated, and that neither the state nor the defendant be subject to the expense or annoyance of further proceedings which cannot end in conviction."
>
> State of Iowa vs. Field, 106 Iowa, 406, page 412.

This case clearly demonstrates the reason for the rule.

Where it has been adjudicated that an indictment is barred by the statutes of limitations, there is nothing in reason or public policy, which requires that the prosecutor shall seek another indictment putting the defendant to further useless expense, disgrace and annoyance. And because after the judgment has been rendered and after it has become finally established by failure to appeal or review it, another rule is laid down, which shows it to be erroneous, is no reason why it should be re-opened. This is a collateral attack, and whether

the judgment was erroneous or not, the judgment is final.

> "An erroneous acquittal standing unreversed is a sufficient foundation for the plea of autrefois acquit."
>
> Archbold's Crim. Pl. & Ev., 21st Edition, 149.

> "Where a petition on a cause of action, appearing on its face to be barred by the Statute of Limitations, is demurred to for that reason, and the demurrer is sustained and another suit is subsequently brought upon the same cause of action, the petition therein alleging facts showing that the statute has not run, the latter suit cannot be maintained, as the demurrer to the first suit, although error, was a former adjudication and a bar to any other suit."
>
> Wells on Res Adjudicata, Section 274.

A judgment on demurrer is as conclusive as one rendered on proof. This Court has held, in case of Northern Pacific Bank vs. Slagt, 205 U. S., 122, at page 130:

> "It is well established that a judgment on demurrer is as conclusive as one rendered on proof."

And at page 132:

> "Especially where the demurrer was not merely formal, but went to the merits."

Citing authorities.

In Lamar vs. United States, 240 U. S., 60, the following language is used (page 65):

> "The objection that the indictment does not state a crime against the United States goes only to the merits of the case."

In Detroit, etc., vs. Mich. R. R., 240 U. S., 564, at page 571, Mr. Justice Van Devanter says, referring to Section 237 of the Code:

> "All judgments and decrees which determine the particular cause are final in the sense of the statute."

Citing cases.

And in Mt. Vernon Cotton Co. vs. Alabama Power Co., 240 U. S., 30:

> "Judgment finally disposing of petition for writ of prohibition is final judgment. The fact that denial of writ does not decide the merits of principal suit is immaterial."

There was and is a valid existing judgment on the merits dismissing the first indictments, unappealed from and unreversed.

We are, therefore, brought to the question, did this judgment preclude further prosecution? whether as res adjudicata or by reason of its being an acquittal of the defendant.

The case of Commonwealth vs. Gould, cited by the government (brief, page 20), can best illustrate our point conclusively. In that case the first

indictment was dismissed because it failed to state the dimensions of the mortal wound. Suppose the second indictment was identical and didn't supply the omission, could there be any doubt that the former judgment would apply and the doctrine of res adjudicata applied?

The Criminal Appeals Act contains a provision that appeals thereunder can only be taken within thirty days of the judgment. What then becomes of this provision when by these devious means a prosecutor can allow the time to expire and so again and again indict on an indictment identical with the first, and although the time for appeal has expired, contend on appeal from the second that it raises the same question and so wipe out the benefit of the first decision, for in this case Judge Thomas said in deciding the original indictment (Rec., page 46) on the first demurrer and pleas, "other questions besides limitation were submitted which were of 'vital importance and decisive.'"

The government cites many cases in support of the doctrine of former jeopardy. There can be no question of the application of that doctrine. The question here is not former jeopardy, but a binding judgment on a definite question exactly the same as the one raised by the present indictment. The following cases fully support the contention of the defendant-in-error:

Commonwealth vs. Ellis, 160 Mass. (1893), page 165, in which Holmes, J., was one of the Court, the following language is used:

> *"A fact once determined by a court of competent jurisdiction in a criminal proceeding, cannot again be litigated between the same*

parties unless a different rule applies to criminal proceedings from that which obtains in civil proceedings; but it is well settled that the rule is the same in both classes of cases."

See also Galston vs. Hoyt, 3 Wheat. at page 316; decision by Story, J.
Reg. vs. Haughton, 1 El. & Bl., 501.
Rex vs. Brown, 17 Cox Criminal Cases, 79.
Regina vs. Houston, supra.

* * * * * * * *

The general rule as to how far judgments are controlling, is well stated in the case of Coffey vs. United States, 116 U. S., 436, at page 445, where it was held:

"Blatchford, J. The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as a defense, conclusive, between the same parties, upon the same matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, rising incidentally upon any question in another court, for a different purpose."

See also

Bissel vs. Spring Fall Township, 124 U. S., at 225, page 233.
Bouchaad vs. Dias, 3 Denio (N. Y.), 238.

Or again, as it has been stated in State vs. Wear, 145 Mo., 162, page 205:

"The pendency of a cause in a court where jurisdiction exists, and has been acquired in a lawful manner, is a test of the continuance of such jurisdiction, and of its valid exercise until final disposition is made of the cause, no matter how flagrant may be the errors which attend the exercise of such jurisdiction, nor how numerous and obvious may be the errors with which the record abounds, because the jurisdiction to decide right, being once conceded, such concession necessarily embraces the power to decide wrong, and a wrong decision though voidable, and though it may be avoided, yet until avoided is equally as binding as a right one; it cannot be attacked collaterally; the only way its binding force can be escaped or avoided is by appeal or writ of error. Outside of these two methods, it is impregnable to all assaults. This doctrine is as ancient as the law itself and abounds in every treatise where judgments and jurisdiction of courts are mentioned or commented upon."

The Government contends that this doctrine of res adjudicata or estoppel is peculiar to the civil side of the Court and not known to the criminal law Government brief, page 20, but *there is no reason why this rule should not be applicable to both civil and criminal proceedings. Its very foundation in the law of this country was a celebrated criminal case in England, that of*

Rex vs. *Duchess of Kingston* (1776) 20 State Trials at 538 and elsewhere

which has been quoted and relied on in the decisions of this Court and every United States Court,

besides the State Courts when the question of res adjudicata was raised, in criminal or quasi criminal proceedings and civil matters, not once, but hundreds of times.

In that case numerous citations of counsel show that res adjudicata has been applied to criminal law long before that time and it has been repeatedly applied in criminal proceedings, as shown by this brief.

See also

State vs. Wear, 145 Mo., 162, 193:

> "Conceding for the purpose of argument only, that the facts disclosed by the record, did not justify Judge Mauldin in making the order discharging the defendant and that it was arbitrary exercise of judicial power, as to which the law affords the State no redress, to the end that defendant should go acquit of the crime charged against him, it is sufficient that the order when made, operated as an acquittal of the defendant, and that he could not thereafter be indicted and put upon trial for the same offense."

And in any view of the case, Judge Pope was bound by the rulings made by Judge Thomas as long as these rulings stood unreversed.

District of Columbia vs. Brewer, 37 Washington Law R., 64,

Where it was in effect held:

> "Where on a former appeal a judgment for plaintiff was reversed on the ground that he

had no right of action because of his contributory negligence, and, the cause was remanded for a new trial, the ruling so made by this Court constituted the law of the case on the second trial, notwithstanding the fact that, pending such re-trial, the Supreme Court of the United States in deciding another case from this Court to which the rule announced by this Court on the former appeal had been applied, had discussed the decision of this Court on such former appeal and declared the rule announced therein to be erroneous, the Court saying (page 65):

"The Court (U. S. Sup. Ct.) repudiated the doctrine announced by us in this case, but left the decision exactly where it was, and while the rule announced by the Supreme Court will control and govern in future cases in this Court, it affects this case no more than it does any other case previously disposed of by us."

See also

Oglesby vs. Attrill, 14 Fed. Rep., 214-215,

where one Judge refused to review question examined and passed upon by another.

We therefore submit that the Court below was within the law when it applied the bar of the former judgment. To hold otherwise would now send the defendant back for trial on an indictment identical with one where there is a final judgment entered in the same court between him and the government clearly to the effect that he cannot be prosecuted for the very offense on which he will be prosecuted.

We further submit that irrespective of all the questions raised by either side, nothing else need be considered on this appeal, for even if the pleas should be held to be in bar, and the decision of the Judge below held to construe a statute, yet the bar of this existing judgment prevents a reversal in this case.

POINT II.

(On Writ of Error.)

The present indictment in the case at bar, in legal effect, is exactly the same as the one before Judge Thomas. It contained no new matter which constituted either a new crime or a new overt act.

The Government, by its brief, Point V, seems to place considerable stress upon the proposition that the present indictment contains a new additional overt act, and hence destroys the claim of the defendant in error that the judgment to the former indictment is not conclusive.

The contention of the Government necessarily involves two questions.

(A) If the Court was wrong in its conclusion that the indictment is the same, can such conclusion be reviewed upon this Writ of Error?

(B) Will this Court undertake to place its own construction on the similarity of the alleged facts designated as an additional overt act to those of the previous indictment.

On the cases already cited, both of these propositions, as it seems to defendant in error, must be answered in the negative, but on analysis it well be found both indictments legally identical.

Under the statute on which this Writ of Error comes to this Court, this Court has no power to attempt to construe the legal effect of an indictment, the sufficiency of an overt act, or to review a finding upon those subjects by a trial Court (see cases, supra).

Assuming that the Court may seek to ascertain the sufficiency of the allegations claimed to be new and important, some of the matter which moved the Court below is set forth.

Section 5440 of the Statutes, in defining the crime of conspiracy, provides that an overt act must occur "to effect the object of the conspiracy." This indispensable element involves the necessity of pleading a fact. That is, that the act done designated as an overt act must "effect the object of the conspiracy," and the pleader must so plead the fact that the Court can see that the alleged act designated as an overt act does have the effect of carrying out or effecting the carrying out of the incompleted conspiracy, and mere conclusion on the part of the pleader that a certain act does effect the object of the conspiracy, is not pleading a fact.

To illustrate, the indictment in question sets forth an alleged conspiracy to conceal assets from a trustee in bankruptcy. If the pleader saw fit to recite that the defendant in error, to effect the object of the conspiracy recited in the indictment, on a certain day denied that he was a conspirator, and prefaced that allegation by the pleader's conclusion that the fact, called an overt act, did ef-

fect the carrying out of the conspiracy, no lengthy argument is required to demonstrate that that fact is not well pleaded.

Applying this example to the alleged facts pleaded in the indictment claimed by the Government to be new in character, the Government in substance sets forth that the defendant in error in a certain proceeding in bankruptcy against Abraham & Lesser, denied that he received a counsel fee, two years before, from Joseph Samuels & Co., another client (R., page 20).

It needs no extended argument to see that the alleged act was not an act at all, merely a denial of an alleged act which was alleged to have occurred two years before the hearing.

As stated by Judge Pope (Rec., page 48):

> "An examination of the additional overt act alleged in the last indictment leads to the view that, notwithstanding certain conclusions of law therein set forth, the matters therein stated cannot, from their nature, constitute an overt act under the conspiracy alleged in each of the indictments. It follows, therefore, as stated above, that the two indictments are legally identical."

United States vs. Hyde & Schneider, 225 U. S., 348 and cases cited.

"An overt act must be a beginning, a step, in its (the conspiracy's) execution."

See Salas vs. U. S., June, 1916, C. C. A. 2nd Circuit.

So, too, the testimony was submitted, and is before this Court to show that the testimony alleged

never was given, hence there was no overt act (see Record, pages 29 at 30, fols. 52, 53). The testimony shows defendant admitted receiving $1,200 from Joseph Samuels & Co., his denial of the receipt of moneys was from Abrahams & Lesser, while the indictment is based on the concealment of assets of Joseph Samuels & Company.

These are concrete examples of how the entire case would be opened here by Government's contentions, and this Court would then have before it the other questions in reference to the overt act which were before the Court below, as for instance. The indictment shows the assets concealed in 1912, and the conspiracy complete when trustee was elected, hence no overt act could have been done by one conspirator in 1914 as alleged.

In re Black, 160 Fed. Rep., 431, 147 Fed., 837.

United States vs. Pettiborne, 148 U. S., 193.

United States vs. Hyde & Schneider, supra.

The act must have the conspriacy in view and have some power to affect it. And in United States vs. Lonabaugh, 179 Fed., 476, Judge Van Devanter, writing, says:

> "When the object of the conspiracy is attained, there cannot be a further overt act."

So, too, the act must be one that does not negative a wrongful purpose. Here it is set forth the money was to be paid as a counsel fee, which still is a legal payment—and once paid, defendant cannot be accused of conspiracy to conceal bankrupt's ssets, if it was the property of defendant in error as the indictment itself infers.

United States vs. Waldman, 199 Fed., 753.

> "It is not a criminal offense for a person who is not a bankrupt to conceal property from the trustee."

The government's brief, page 26 states that all the acts in the first indictment took place in 1912, and seeks to show such is not the case in the last indictment, but a casual reading shows the last indictment, too, sets forth *all acts* in 1912, only the passive recital in 1914 of an alleged act in 1912.

The Government is also in error, brief page 28, in saying:

> "Had the defendant in error testified truly that he received and collected the note of $897.36, the referee could have ordered him forthwith to return the money to the trustee."

The record before this Court, page 30, shows this defendant did admit the receipt of $1,200.00, and no such order could be made, for the indictment itself alleges the payment as "counsel fee." The government's brief, page 29, shows its entire theory of the case is wrong when it makes the colossal error of saying:

> "The alleged false statement was made before a referee who was endeavoring to ascertain what had become of the assets of the estate."

This is shown by record, page 29. *The hearing was on application for an allowance as counsel fee in another case,* and the indictment itself, record, page 20, alleges:

"At a hearing in support of an application for an allowance, he testified, etc."

The statement on page 28, Government's brief, then becomes ridiculous that "the testimony deprived the estate of assets," the indictment and record show the money if paid was paid in 1912, the testimony in 1914 deprived no one of anything.

If the Court looks into these questions, it will be seen that there was no overt act alleged in the last indictment to differentiate it from the former ones and the former judgment controls.

CONCLUSION.

The pleas below were a demurrer and motion to quash and not a plea in bar. In either case the Court did not construe a statute, so the writ of error should be dismissed.

The citation, writ of error, are fatally defective.

The doctrine of former judgment applies to all cases and proceeding in all courts, and the identical question having been settled by a previous final judgment between the parties the judgment of the Court below now attempted to be reviewed was right, and the appeal should be dismissed and judgment affirmed.

Respectfully Submitted,

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